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April 19, 2001
EXECUTIVE SECRETARY
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David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition to Convene a Contested Case Proceeding to Establish
"Permanent Prices" for Interconnection and Unbundled Network
Elements*
Docket No. 97-01262

Dear Mr. Waddell:

This is in response to a question posed yesterday by Director Malone in connection with the general tariff the Authority ordered BellSouth to file incorporating the rates adopted in this proceeding. The question was as follows:

Assume a carrier wishes to adopt a rate from the UNE tariff, and that the carrier's existing interconnection agreement has no term or conditions corresponding to that rate. Assume further that the Authority has issued an arbitration order on the issue and that the carrier, which was not a party to the arbitration, proposes that BellSouth allow it to adopt the rate with negotiated contract terms based on the arbitration order. What would be BellSouth's response in those negotiations?¹

As stated in BellSouth's response to comments filed by AT&T and SECCA regarding BellSouth's tariff², to the extent that the carrier was referring to decisions from generic dockets, BellSouth agrees and indeed already negotiates contract

¹ This is a paraphrase of Director Malone's question, which appears at pages 11-12 in the transcript from the April 17, 2001 Agenda Conference.

² See BellSouth's Response to Comments Filed by AT&T and SECCA Regarding BellSouth's Tariff, filed April 16, 2001.

language incorporating state commission decisions from generic dockets into its standard interconnection agreements.

The situation with respect to arbitrations is more complicated. In arbitrations, carriers that did not participate in the arbitration may take the position that they are not bound by a ruling in such a proceeding because they were not afforded an opportunity to participate in the proceeding³. Carriers may take such a position, based not only on due process grounds, but on the basis that arbitration orders by their terms only apply to the parties to the arbitration.

BellSouth cannot agree, as a general matter, that it will adopt a ruling from a two-party arbitration on a generic basis into interconnection agreements with other carriers. While past TRA arbitration decisions are a major factor in BellSouth's analysis of its negotiation and arbitration strategies and its decision to bring an issue already arbitrated before the TRA again, BellSouth must also determine whether any new facts or legal or regulatory decisions have developed since the issue was last presented to the TRA and whether those facts or decisions may have an impact on the TRA. Any agreement to accept a ruling from a two party arbitration as binding in all instances for BellSouth will not allow BellSouth to present important new facts or legal or regulatory precedent in a effort to persuade the TRA to reach a different result. Further, the acceptance of such a ruling as generic would eliminate the ability of BellSouth and other telecommunications carrier's from reaching compromise. Lastly, BellSouth's rights to seek judicial review of arbitration rulings would be impaired. It could be argued, for example, that BellSouth voluntarily agreed to arrangements with one carrier with respect to the same issue BellSouth was appealing in connection with the carrier that was a party to the arbitration. Arguably, such an agreement could be binding on BellSouth with respect to the requesting carrier even if BellSouth ultimately prevailed in its appeal with the carrier involved in the arbitration. Furthermore, in this scenario there is no binding order between the carrier requesting the terms and BellSouth from which an appeal can even be taken.

³ AT&T would support BellSouth's position as to the effect of decisions in two party arbitrations. Mr. Bradbury of AT&T testified that, if another company arbitrated with BellSouth on an issue which affected AT&T and the result were unsatisfactory to AT&T, he would not simply accept that result: "If we thought the position that was arrived at was so adverse to our interests, we would have to consider additional action." Transcript of Proceedings (4/10/01), Docket No. 00079, Vol. II(B) at p. 214.

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It should be noted that BellSouth has not appealed the vast majority of arbitration rulings in Tennessee nor has BellSouth brought forth a large number of identical arbitration issues in numerous arbitration proceedings. The Directors, acting as Arbitrators, have entered hundreds of rulings in arbitration proceedings in Tennessee over the last four years and BellSouth has appealed only a very few of those rulings. However, BellSouth feels that it is critical that it not compromise its rights to bring new evidence before the Directors or seek judicial review as a result of implementation issues arising in connection with the UNE tariff ordered by the Authority. BellSouth also believes that the tariff it has been ordered to file should not be used to eliminate the rights of parties to present issues to the Authority in an arbitration simply because another party also raised the issue in an earlier arbitration.

While language in arbitration orders may directly address the arbitration issue posed by the parties seeking arbitration, the language in the arbitration order is typically not in the form or specificity of contract language.⁴ This is not surprising and no different from the language a reviewing court typically includes in its orders with respect to arbitration appeals. The arbitrators, like the courts, are not asked to write the parties' contracts.

Consequently, negotiations are necessary to develop contract language. A number of factors enter into these negotiations. In the constantly evolving telecommunications industry, circumstances, policies, and regulatory rules may change between the time arbitrators deliberate and the time the parties ultimately submit an interconnection agreement for approval. Moreover, it is possible that the arbitrators' ruling itself may prompt the parties to settle an issue, or a number of issues, under terms different from those set forth in the arbitrators' ruling. For example, regional settlements of arbitrations may be prompted by varying rulings from public service commissions in several states on a given arbitration issue. It is also possible that neither party is happy with an arbitration ruling. In any event, the purpose of arbitrations is to facilitate the resolution of the parties' open issues and

⁴ In some cases, the arbitrators request best and final offers from the parties. In such cases, the arbitrators may adopt best and final language that is very close to final contract language.

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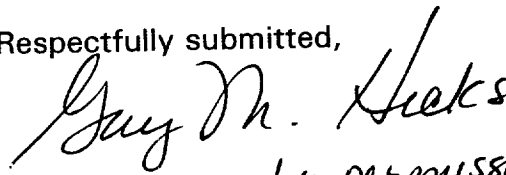
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such settlements, even if they are under different terms set forth in the arbitrators' ruling, resolve those issues in a matter satisfactory to the parties.

A copy of this letter has been provided to counsel of record in this proceeding.

Respectfully submitted,


Guy M. Hicks by permission (ch)

GMH:ch

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2001, a copy of the foregoing document was served on the parties of record as indicated:

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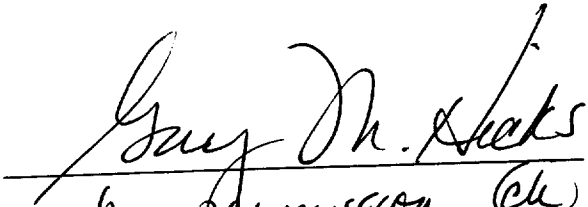
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